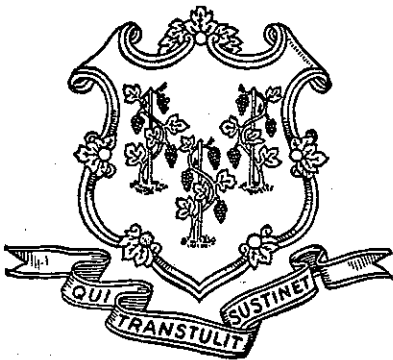


# DEP RESOURCES RECOVERY FACILITY DETERMINATION- OF-NEED PROCESS

Connecticut

General Assembly



LEGISLATIVE  
PROGRAM REVIEW  
AND  
INVESTIGATIONS  
COMMITTEE

DECEMBER 1994

**CONNECTICUT GENERAL ASSEMBLY  
LEGISLATIVE PROGRAM REVIEW AND INVESTIGATIONS COMMITTEE**

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LEGISLATIVE PROGRAM REVIEW  
& INVESTIGATIONS COMMITTEE

DEP Resources Recovery Facility  
Determination-of-Need Process

DECEMBER 1994

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## **SUMMARY**

### **DEP RESOURCES RECOVERY FACILITY DETERMINATION-OF-NEED PROCESS**

Connecticut law requires the environmental protection commissioner to make a written determination of need for additional capacity before issuing a permit to construct or expand a resources recovery or other solid waste disposal facility. To date, the Department of Environmental Protection (DEP) determination-of-need process, has applied to only one resources recovery facility--a controversial waste-to-energy plant under development in Lisbon by a private waste management firm. In March 1994, the program review committee initiated a study of the DEP need determination process, focusing on the Lisbon facility case.

The department's decision, reached in February 1993, that the additional capacity of the Lisbon facility was necessary to meet the state's solid waste disposal needs has been widely criticized. The fact that the lengthy administrative proceedings produced different findings on need raised questions about the adequacy of data and methodologies used by the department. Doubts grew when newer solid waste planning data indicated the state would have less waste requiring disposal and more available capacity than originally projected. The atypical nature of the Lisbon case also prompted questions about compliance with the statutes and regulations that govern DEP proceedings. Some even suggested the possibility of outside influence affecting agency decisions on the Lisbon facility.

Concern over the adequacy and integrity of the DEP need-determination process in the Lisbon case led the program review committee to examine three main issues: compliance with statutes and regulations governing the process, particularly those related to ex parte communication; the qualifications of DEP staff involved in need determination; and the methods and data used by the department to make decisions on need. The committee's review focused on the propriety and sufficiency of agency procedures related to the Lisbon case. The study was not intended to be an independent evaluation of need for additional waste disposal capacity in Connecticut.

Based on a review of the administrative record and interviews with agency personnel and others involved in the process, the program review committee found nothing irregular about the Lisbon proceedings. Some aspects of the process were unusual when compared to the majority of DEP permit cases. However, it appears the Lisbon proceedings were carried out in compliance with all relevant requirements. To date, the courts have upheld the actions of the DEP final decision maker, finding no errors of law or procedure nor any abuse of discretion.

Many facts presented during the Lisbon proceedings, including much of the available data on need, were subject to interpretation. The program review committee found no evidence for why different conclusions on need were reached other than different approaches to weighing and interpreting waste generation, disposal, recycling, and operating capacity data. Sworn statements

taken from key participants in the Lisbon case revealed no evidence of unauthorized ex parte communication or inappropriate outside influence of decision makers assigned to the Lisbon case.

The committee was concerned that the appearance of outside influence was created by the involvement by the governor's office in the Lisbon matter while the final decision was pending. However, the contact that occurred did not violate any statute or regulation. Furthermore, the committee found no evidence the meetings had any impact on the final decision maker or were intended to influence the outcome of the Lisbon proceedings.

The credentials of DEP staff assigned to the Lisbon case compared well with those of other government professionals responsible for analyzing need. The formula used by DEP to calculate need was similar to solid waste management planning approaches used by a number of other states. Despite its limitations, the information contained in the 1991 state solid waste plan was relied upon as the best available for calculating need by all parties during the initial Lisbon proceedings. The program review committee believes the approach taken by the department to revise its need calculations as newer data were developed was reasonable, if conservative. It appears estimates of needed resources recovery facility capacity varied and will continue to do so as better quality data and different planning assumptions are applied to the department's need determination formula.

The program review committee's conclusions about the Lisbon proceedings, which were formally adopted at its December 14, 1994 meeting, are summarized below. The committee study did not result in recommendations for changes in the determination-of-need process. From its review, the committee found nothing improper or insufficient about the department's procedures for determining need for the Lisbon facility. The committee findings are not endorsement of a particular decision or methodology as the study scope did not include substantive analysis of the state's need for additional solid waste disposal capacity.

## CONCLUSIONS

- **Committee research revealed no evidence of irregularities in the Lisbon determination-of-need process. It appears that the department complied with all relevant statutes and regulations concerning administrative proceedings in a contested case.**
- **Statutory requirements concerning communications during a contested case appear to have been met by those involved in the Lisbon proceedings. The program review committee found no evidence of prohibited ex parte communication related to the Lisbon case.**



- **Department of Environmental Protection staff involved in the Lisbon determination of need proceedings were competent and the methodology employed by the agency was sound. The data used by DEP staff and the final decision maker had acknowledged limitations but were generally the best available and adequate for estimating future capacity needs.**
- **The fact more recent analysis--carried out by the department during the current year--shows excess capacity occurring without any new construction does not substantiate claims that data and methodology used during the determination-of-need proceedings case were inadequate. Current need projections are based on factors that changed after the agency's amended final decision was issued (i.e., higher permitted capacity, greater guaranteed operating capacities, and a statutorily increased state recycling goal) as well as more up-to-date and comprehensive waste generation information.**



## INTRODUCTION

In March 1994, the program review committee approved the scope for a study of the Department of Environmental Protection (DEP) process for determining need for new or expanded solid waste management disposal facilities. To date the process has applied to only one resources recovery facility--a controversial plant under development in Lisbon by a private waste management firm.

The department's decision, reached in February 1993, that the additional capacity of the Lisbon facility was necessary to meet the state's solid waste disposal needs has been widely criticized. The fact that the lengthy administrative proceedings produced different findings on need raised questions about the adequacy of data and methodologies used by the department. Doubts grew when newer solid waste planning data indicated the state would have less waste requiring disposal and more available capacity than originally projected. The atypical nature of the Lisbon case also prompted questions about compliance with the statutes and regulations that govern DEP proceedings. Some even suggested the possibility of outside influence affecting agency decisions on the Lisbon facility.

Concern over the adequacy and integrity of the DEP need-determination process in the Lisbon case led the program review committee to direct its staff to review three main issues: compliance with statutes and regulations governing the process, particularly those related to ex parte communication; the qualifications of DEP staff involved in need determination; and the methods and data used by the department to make decisions on need. The committee's review focused on the propriety and sufficiency of agency procedures related to the Lisbon case. The study was not intended to be an independent evaluation of need for additional waste disposal capacity in Connecticut.

Information for the committee review was gathered through a variety of methods. Committee staff analyzed each of the written decisions related to the Lisbon case as well as the 1991 state solid waste management plan, the foundation for DEP decisions on need. The record of the Lisbon proceedings, which included transcripts and exhibits from 23 days of administrative hearings and oral argument, and relevant agency files were reviewed. Interviews were conducted with DEP staff and officials as well as representatives for the applicant in the proceedings and other parties to the case. Sworn statements were taken from key individuals involved in the Lisbon determination-of-need (DON) process, who are listed in Appendix B).

Conclusions about the Lisbon determination-of-need process are presented in the first chapter of this report. The committee study did not result in recommendations for changes in the determination-of-need process. In addition, committee findings presented in Chapter I are not an endorsement of a particular decision or methodology as the study scope did not include substantive analysis of the state's need for additional solid waste disposal capacity.

Chapters II through V provide background information on: process requirements and implementation; communication; staff qualifications; and the data and methods used to determine need along with the current status of DEP waste generation and disposal data. A summary of the DEP determination of need law, a chronology of major events related to the Lisbon case, and an overview of the major steps in the determination-of-need process are contained in Appendices C, D, and E, respectively.

It is the policy of the Legislative Program Review and Investigations Committee to provide agencies subject to study with an opportunity to review and comment on findings and recommendations prior to the publication of a report. A formal response to this report was solicited from the Department of Environmental Protection and the written comments received are contained in Appendix A.

## **CHAPTER I**

### **CONCLUSIONS**

Connecticut's law requiring the environmental protection commissioner to make a written determination of need for additional disposal capacity before issuing a permit to construct a resources recovery facility was enacted in 1987. The current statutory process and its legislative history are summarized in Appendix B. The first permit application subject to the determination-of-need law was from Riley Energy Systems of Lisbon (RESOL), a private concern later acquired by Wheelabrator (a subsidiary of Waste Management, Inc.), to construct and operate a waste-to-energy plant in Lisbon.

Even without the need determination component, the Lisbon case was complex and highly contested, involving multiple permits and parties. The proposed waste-to-energy facility required solid waste, air, and water permits from DEP as well as a final determination of need before construction could begin. In addition to the applicant and the department, original parties to the Lisbon proceedings included Connecticut Resources Recovery Authority (CRRA), the City of Norwich, Concerned Citizens of Lisbon, and Northeastern Connecticut Regional Resources Recovery Authority. Following the first proposed decision, Southeastern Connecticut Regional Resources Recovery Authority (SCRRA), which oversees the Preston waste-to-energy plant, was granted party status.

The department's administrative proceedings, consolidated to handle all facility permits and the determination of need simultaneously, were lengthy and complicated as the chronology presented in Appendix C indicates. For example, initial fact-finding conducted by a hearing officer from the department's adjudications office, Attorney Cynthia Watts-Elder, took place on 14 separate hearing days over a four-month period. Also, the Lisbon proceedings, unlike most DEP permit cases, involved a remand to the hearing officer following the first proposed final decision, a reversal of the proposed final decision, and reconsideration of the final decision. In addition, while the DEP commissioner usually makes final decisions, the final decision maker in this case was an agency bureau head, Dr. Hugo Thomas. Commissioner Timothy Keeney appointed a designee after it was determined he had inadvertently disqualified himself by answering correspondence related to the Lisbon issue.

Findings on the need for the Lisbon facility varied during the agency proceedings. The first proposed decision found the Lisbon facility was needed but recommended against issuing the construction permit due to concerns over air and water issues. After gathering additional evidence during remand hearings, the hearing officer modified her proposed final decision, finding, in contrast to the recommendation of DEP solid waste staff, that the Lisbon plant was not needed. The final decision maker did not adopt the hearing officer's recommendation on need; instead, he authorized issuance of a final determination of need with a permit to construct the Lisbon resources recovery plant.

In response to motions to reconsider from several parties and supported by DEP staff, the final decision maker heard additional testimony related to need for the facility. Although calculations were modified in light of the new data presented, the final decision maker still found the Lisbon facility was needed and would not result in substantial excess capacity. The amended final decision, which on appeal to court was remanded to the department for further proceedings, is still subject to a variety of legal actions. As the permit remains valid during the appeal period, the applicant has proceeded with construction of the facility.

The fact that the proceedings produced different findings on need for the Lisbon facility raised concerns about the adequacy of data and methodologies used by the department. Furthermore, newer planning data indicated less waste requiring disposal and more available disposal capacity than originally projected by the department. The atypical nature of the Lisbon case also prompted questions about compliance with the statutes and regulations that govern DEP proceedings. Some even suggested the possibility of outside influence affecting agency decisions on the need for the Lisbon facility.

The primary purpose of the program review committee study was to determine 1) whether the Lisbon proceedings complied with relevant statutes and regulations, particularly those concerning communication during a contested case; and 2) if the department's data, methods, and staff resources were adequate for determining need for the Lisbon resources recovery facility. The committee's conclusions regarding these issues are presented below. Findings are limited to the propriety and adequacy of the department's procedures as the committee review did not attempt to evaluate the substance of decisions on need for additional disposal capacity.

- 1. Committee research revealed no evidence of irregularities in the Lisbon determination-of-need process. It appears that the department complied with all relevant statutes and regulations concerning administrative proceedings in a contested case.**

The program review committee found nothing irregular about the Lisbon proceedings based on a review of the record and interviews with key participants in the process. Some aspects of the process--the designated final decision maker, the order remanding the case to the hearing officer, the reversal of the proposed final decision, and the reconsideration of the final decision--were unusual when compared to the majority of DEP permit cases. However, these and all other steps taken in the Lisbon proceedings conform with provisions of the Uniform Administrative Procedure Act and the agency's own "Rules of Practice" regulations.

Certain procedural actions and legal interpretations related to the Lisbon case were disputed by the various parties and some have been appealed. To date, the courts have upheld the actions of the DEP final decision maker, finding no errors of law or procedure nor any abuse of discretion. It appears the Lisbon proceedings were carried out in compliance with all relevant requirements. The issue remaining before the court at present is substantive, not procedural

(i.e., whether the permit condition requiring the developer of the Lisbon facility to displace waste from its Connecticut customers only with other in-state generated waste unconstitutionally violates the federal commerce clause).

The fact the environmental protection commissioner was not the final decision maker in the Lisbon case, while unusual, had no special effect that the committee could perceive. If anything, the designated final decision maker, an agency bureau chief with no programmatic responsibilities for solid waste or permitting, could be considered more removed from potential outside influence or pressure than the commissioner, a political appointee. However, as noted in the following section, questions about the objectivity of decisionmaking under the state's present system for adjudicating contested cases like Lisbon can always be raised since final decision makers and individuals representing the state as a party are within the same agency.

The Lisbon proceedings were atypical in that they involved a remand, a reversal of a proposed decision, and reconsideration of the final decision. Given the case's complexity and controversy it is not surprising to the program review committee that extra administrative steps occurred and all legal avenues were (and continue to be) pursued by Lisbon project supporters and opponents. From the beginning, the process was expected to be lengthy and contentious, as the many parties had differing views and interests concerning a number of environmental matters.

The committee believes the extra steps that occurred in the process--the remand, reversal, and reconsideration--are indicative of two major difficulties confronting decision makers in the Lisbon case: 1) the ambiguity of the need determination law; and 2) the imprecision of the data available to calculate need. The Lisbon case was the first application of the need statute. It became clear early in the process that the meaning of many provisions was subject to interpretation. Among the matters argued during the initial proceedings, for example, were: what constituted proof of need--letters of intent versus signed contracts; whether and how the department was required to consider regional waste disposal needs; was distance between customers and the facility a relevant transportation issue; and was the agency required to give priority to expansion of existing facilities versus new construction. Debate over statutory meanings and related solid waste management policy issues added to the length as well as the complexity of the proceedings.

The March 1992 remand order calling for additional proceedings was prompted by two factors: 1) the hearing officer had concluded (in her first proposed decision) that the evidence related to certain air and water issues was insufficient; and 2) a new entity (SCRRRA) concerned about the creation of excess capacity had been granted party status. It appears the final decision maker's only other choice would have been to deny the application. A denial would require the proceedings begin all over again, including the taking of testimony on all environmental issues that had been satisfactorily addressed, if, as expected, the developer submitted a new application for the project.

Weaknesses of the data available during the Lisbon proceedings were recognized by all participants. Much of the information used by the department and other parties to establish waste generation, recycling, and operating capacity figures was based on estimates; actual numbers generally were unavailable or incomplete. Calculations of future need, by necessity, involved assumptions and predictions, and varied over time as estimates were refined and conditions changed.

In essence, many facts, including much of the data on need, presented during the Lisbon proceedings were subject to interpretation. The program review committee found no evidence for why the hearing officer and the final decision maker in the Lisbon case reached different conclusions on need other than their different approaches to weighing and interpreting the data.

**2. Statutory requirements concerning communications during a contested case appear to have been met by those involved in the Lisbon proceedings. The program review committee found no evidence of prohibited ex parte communication related to the Lisbon case.**

Evidence of prohibited communication would be grounds for appeal of the department's final decision in the Lisbon matter. Appeals from the Lisbon final decision to date make no claims regarding violations of Section 4-181 of the Connecticut General Statutes, the provision of the Uniform Administrative Procedure Act concerning communications during contested cases. The record from the Lisbon proceedings contains no objections based on the occurrence of ex parte communication.

Based on interviews with the key participants in the Lisbon matter, it appears that neither the decision makers nor the staff assigned to assist them, communicated directly or indirectly, with any party or other interested person, in connection with the case without the knowledge and/or participation of all the parties. Each individual interviewed--including the hearing officer, the final decision maker, the final decision maker's legal advisor, and the attorneys who represented the applicant and the other parties, among others--stated under oath to program review committee staff that they had no knowledge of ex parte communication occurring during the case.

Overall, the committee found DEP officials and staff involved in the Lisbon case aware of the requirements of C.G.S. Section 4-181 and conscientious about compliance. Both the final decision maker and his legal advisor, for example, reported to committee staff that at times they would excuse themselves from departmental meetings unrelated to Lisbon because something about the case unexpectedly came up for discussion. To insure against ex parte communication, the hearing officer and final decision maker instructed parties not to contact them even about minor scheduling matters; their secretaries screened telephone calls and correspondence to insure against contact with parties outside the formal hearing process.



The final decision maker's legal advisor noted "vigilance" is required to prevent accidental ex parte communication within the agency during any contested case since the final decision maker, whether the commissioner or a designee, is also the superior or at least a colleague of agency staff who represent the agency as a party. It appears the only problem in maintaining the necessary separation between the department's adjudicatory and advocacy roles in the Lisbon matter occurred when the commissioner inadvertently disqualified himself as final decision maker by responding to a citizen's letter on the issue at a point early in the permit process.

Interviews conducted by program review staff provided no evidence of inappropriate outside influence of decision makers assigned to the Lisbon case. The hearing officer, final decision maker, and the legal advisor to the final decision maker each stated under oath to committee staff they were neither pressured nor improperly influenced by anyone inside or outside the agency to reach a particular finding or conclusion. When specifically asked about pressure or influence from the DEP commissioner, the governor, or any of the governor's staff, the decision makers as well as the DEP staff that prepared and presented the agency's position during the proceedings reported having no substantive contact about the Lisbon matter with those individuals.

In his sworn statement, the final decision maker for the Lisbon case told program review committee staff: "The analysis and conclusions were strictly my own and there was no outside influence from anybody else." All individuals interviewed by program review committee staff, including the environmental protection commissioner, attorneys for the parties, two lobbyists for the applicant, and the governor's chief of staff at the time, stated under oath they did not try to improperly influence the decision makers. No one interviewed had knowledge of attempts to improperly influence the hearing officer, the final decision maker, or the staff assigned to assist the decision makers.

The committee is concerned that the appearance of outside influence was created by the involvement by the governor's office in the Lisbon matter while the final decision was pending. The governor's chief of staff, at the request of several parties, including a lobbyist for the applicant, sponsored two meetings about Lisbon while the matter was under reconsideration.<sup>1</sup> The first, attended just by top officials from DEP and the Connecticut Resources Recovery Authority (CRRA), the primary opponent to the Lisbon project, was aimed at resolving the growing conflicts between those two state agencies over Lisbon; the second involved representatives of the applicant (Wheelabrator) as well as DEP and CRRA.

Such contact did not violate any statute or regulation as there is no evidence either the final decision maker or any staff assigned to help him were present at the meetings.

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<sup>1</sup> While participants in these meetings have different recollections of their timing, there is general agreement that two meetings sponsored by the governor's chief of staff occurred within several weeks of each other and both happened after the Oct. 5, 1992 final decision was issued and prior to the release of the February 1993 amended final decision.

Furthermore, the final decision maker and his legal advisor stated that prior to being interviewed by program review committee staff they were unaware such meetings even occurred. Committee staff interviews revealed no evidence that the meetings had any impact on the final decision maker or were intended to influence the outcome of the Lisbon proceedings.

The program review committee believes, however, the DEP commissioner's participation in the meetings at the governor's office undermines confidence in the independence of the department's determination-of-need process. As the governor's appointee, the commissioner could be viewed attending the meetings to receive direction about the Lisbon case. The commissioner was not the final decision maker in the Lisbon case but theoretically could have directed the final decision maker, a subordinate, or his legal advisor, one of the commissioner's counsel, to take a particular action.

Any contact between agency officials, interested parties, and the governor's office that occurs while a contested case is pending can be perceived as an effort to influence its outcome. The problem of preserving the objectivity of adjudicatory proceedings in executive branch agencies is not unique to the Lisbon case or to the environmental protection department. Legislation to address this problem by establishing an independent administrative adjudications system to handle a variety of contested cases and regulatory matters has been considered by the General Assembly for the past several years and may be reintroduced during the upcoming legislative session.

Legislation enacted during the 1994 session, which extends certain provisions of the state's lobbyist code of ethics to what is called administrative lobbying, will impact communication during contested cases like the Lisbon permit process in the future. Under P.A. 94-69, individuals who attempt to influence executive branch actions on contracts, purchases, grants, loans, permits, or other matters within an agency's jurisdiction must, as with legislative lobbying: register annually with the state ethics commission; identify the matters on which they expect to lobby; and file detailed financial reports. Contact between lobbyists for parties to contested cases and executive branch officials or staff is not prohibited under the amended law but is subject to monitoring by the ethics commission through the registration and reporting requirements.

3. **Department of Environmental Protection staff involved in the Lisbon determination of need proceedings were competent and the methodology employed by the agency was sound. The data used by DEP staff and the final decision maker had acknowledged limitations but were generally the best available and adequate for estimating future capacity needs.**

**The fact more recent analysis--carried out by the department during the current year--shows excess capacity occurring without any new construction does not substantiate claims that data and methodology used during the determination-of-need proceedings case were inadequate. Current need**

**projections are based on factors that changed after the agency's amended final decision was issued (i.e., higher permitted capacity, greater guaranteed operating capacities, and a statutorily increased state recycling goal) as well as more up-to-date and comprehensive waste generation information.**

The credentials of DEP staff assigned to the Lisbon case compare well with those of other government professionals responsible for analyzing need. None of the technical staff involved in the process had less than four years of experience with the department's waste bureau, all staff had advanced degrees, and many had participated in developing the statewide solid waste management plan, a foundation for the need determination process. Both the agency hearing officer and final decision maker for the proceedings were experienced adjudicators. Nothing in the record and no one interviewed by program review committee staff indicated that DEP personnel involved in the Lisbon proceedings were not qualified to carry out their duties.

The formula used by DEP staff and the final decision maker during the Lisbon proceedings, calculated need for resources recovery capacity by:

- determining the total amount of waste generated in Connecticut; and
- subtracting the amount that can be handled at existing disposal facilities (i.e., current waste-to-energy plants and landfills) and through recycling at the rate established in statute as the state goal.

Similar generation-based approaches to solid waste management planning are used by a number of other states, according to a survey recently conducted by the state of California. The DEP methodology, developed with public comment and review as part of the current (1991) statewide solid waste management plan, was accepted by all parties.

In contrast, the data and assumptions underlying each major component of the department's methodology became the focus of debate in the Lisbon case. Even before the Lisbon proceedings began, DEP was well aware of the weakness in the data on waste generation, disposal and recycling. In 1989, the agency stated in its report on the then proposed state solid waste plan that: "... the data has some obvious flaws... [but] represents the current best estimates, and we recommend it be used until routine monitoring of the wastes is in place or better information becomes available."

Despite its limitations, the information contained in the 1991 state solid waste plan was relied upon as the best available for calculating need by all parties during the initial Lisbon proceedings. In fact, evidence contradicting the plan's predictions was not even presented until the April 1992 remand hearing. At that point and throughout the remainder of the proceedings, increasingly more accurate and comprehensive solid waste planning data were (and still are) emerging for a number of reasons. Disposal figures improved as more waste deliveries were weighed, population projections could be updated with new census data, and the availability of trash-burning plants could be based on actual operating statistics for 12-month and longer time

periods. Also, systematic information on recycling became available for the first time through municipal waste reports submitted to DEP in August 1992.

New waste generation and capacity information was incorporated into both the final and amended final decisions, although not to the extent advocated by opponents to the Lisbon plant. The program review committee believes the approach taken by the department to revise its need calculations was reasonable, if conservative. Based on a review of department decisions and supporting documents as well as interviews with DEP decision makers and technical staff, it appears the agency adopted the following standard for revising data to calculate need:

...the estimated statewide average recycling, disposal, and generation rates are very sensitive to relatively small tonnage and/or population changes. Thus, it is extremely important that any adjustments to the data be complete and appropriate. Consequently, DEP staff does not support adjustments based on poorly documented and/or one-sided information. [DEP Reply Brief, January 12, 1993.]

In deciding what new data to include in the record during reconsideration of the October 1992 final decision, the final decision maker was also subject to certain legal constraints. By statute, new evidence can be grounds for reconsideration of a final decision if it: a) materially affects the merits of the case; and b) was not presented earlier for good reason. The final decision makers' ruling that new evidence about operating capacities could have been presented earlier and therefore would not be included during the reconsideration process was upheld, upon appeal, by the court. Overall, the court found the analysis and conclusions contained in the final decision to be reasonable and substantially supported by the facts.

Estimates of needed resources recovery facility capacity continue to vary as better quality data and different planning assumptions are applied to the department's need determination formula. In fact, DEP analysis completed in July 1994 shows excess capacity occurring without any new construction, including Lisbon. The program review committee, however, did not find this to be evidence that either the data or methods used by DEP during the Lisbon determination-of-need proceedings were inadequate.

Using the most recent available data, DEP planning staff now anticipate excess disposal capacity will peak at about 700 tons per day in the year 2000, even if the Lisbon plant never operates. The difference between the department's current need projections and those contained in its final decision on Lisbon is primarily due to two factors:

- 1) existing plants, based on actual operating histories, are guaranteeing higher levels of availability--93 percent of overall design capacity versus the 82 percent established in the 1991 state solid waste plan and the 85 percent assumed in the final Lisbon decision; and

- 2) an increase in the state recycling goal, from 25 percent of all waste generated by the year 2010 to 40 percent reduced and/or recycled by the year 2000, as mandated by a 1993 statutory amendment.

Both changes, which occurred after the final decision was issued in February 1993, have a significant impact on needed capacity. Under the department's current analysis, increased availability at operating waste-to-energy plants alone adds about 450 tons per day of disposal capacity. The state's higher recycling goal means an 800 ton per day reduction in the amount of waste requiring disposal in the year 2000. Applying updated state population estimates also lowers the total amount of waste generated from earlier department projections by about 150 tons per day in the year 2000. The revised projections reflect a population decline, attributed to the poor economic conditions in the state, unanticipated before 1994.



## **CHAPTER II**

### **PROCESS REQUIREMENTS AND IMPLEMENTATION**

The determination-of-need process followed by the Department of Environmental Protection for resources recovery and certain other solid waste disposal facilities is dictated by several statutes and regulations. These include:

- the determination of need statute (C.G.S. Section 22a-208d);
- C.G.S. Chapter 54, The Uniform Administrative Procedures Act (UAPA);  
and
- the department's own "Rules of Practice," which were adopted as agency regulation in 1992 (Connecticut State Agency Regulations 22a-3a-2 to 22a-3a-6(z)).

Statutory provisions governing the approval of the various environmental permits required for construction and operation of a solid waste facility also applied to the Lisbon case. The major steps in the DEP determination-of-need process are outlined in detail in Appendix D.

Implementation of the process in the Lisbon case was analyzed by examining environmental protection department documents and files concerning determination-of-need, reviewing the record of the Lisbon proceedings, and interviewing agency staff and representatives of the parties involved in the process. No evidence of non compliance with relevant statutes or regulations was revealed by this research. Results of the committee's analysis of the process requirements and implementation are highlighted below.

#### ***Summary of Findings***

- The Lisbon case was the first resources recovery application in which DEP was required to issue a determination of need. The process, new to all parties involved, including the department, and the decision makers, therefore, evolved throughout the Lisbon proceedings.

The law requiring a written determination of need for resources recovery facilities, composting facilities, or ash residue disposal areas was established in 1987 and clarified in 1989. The developer of the Lisbon project submitted the first permit application to DEP in December 1988. A complete application that included more detailed need information required under subsequent amendments to the DON law as well as acceptable proof of municipal commitment to the facility, however, was not developed until November 1990.

- In accordance with statute, DEP made a preliminary determination of need concerning the Lisbon facility and published notice of it, although it is not clear whether this occurred within the required timeframe.

Connecticut General Statutes Section 22a-208d (b) requires the commissioner to publish notice of the preliminary determination of need for the proposed facility in a newspaper, within 60 days after DEP has determined the application to be complete. On September 19, 1989 DEP informed the facility developer, Riley Energy Systems of Lisbon (RESOL) Corporation that the application to construct the facility was complete. On November 17, 1989, DEP Commissioner Leslie Carothers informed the applicant by letter that "you [Riley Energy Systems of Lisbon] have not provided an adequate basis upon which I can find that there is need for the proposed facility." The Department issued a press release stating this, but no public notice was issued at this time.

The applicant, having undergone a change in ownership (RESOL was acquired by Wheelabrator), submitted revised permit and determination-of-need applications in October and November 1990. A department memorandum recommending an affirmative preliminary determination of need was written on November 26, 1990. A December 5, 1990, letter from DEP to the applicant (Wheelabrator) stated that "...the revised application package contains all elements required to be considered complete..." but also notes "Your application for a preliminary determination of need is currently under review and evaluation...." A legal notice about a preliminary need determination for the Lisbon plant as well as all other DEP permits for the facility was published May 19, 1991.

- The environmental protection department's Rules of Practice regulations applied to the Lisbon proceedings. DEP appears to have followed the Rules of Practice and the UAPA in its procedures between its preliminary determination of need in October 1990 and its final decision in February 1993.

Section 22a-3a-2 (b)(1) of the agency regulations states that the "Rules of Practice govern practice in all Department proceedings unless otherwise provided by law".

Section 22a-3a-2 (b)(3) states that the "Rules of Practice shall apply on and after their effective date [June 19, 1992] to every department proceeding, whether such proceeding commenced before or after such effective date, except where application to a proceeding that commenced before such effective date would unavoidably result in unfairness to the Staff [of DEP] or any party or intervenor or would prejudice the public health, safety, or welfare of the environment."

- The department held a hearing as required by the Rules of Practice, and the Uniform Administrative Procedures Act.



Section 22a-3a-5 (b)(1) of agency regulations states that "in an application proceeding in which a hearing is held because a statute or regulation requires a hearing or because the Department schedules a hearing on its own initiative, all actions in the proceeding subsequent to the scheduling of such hearing shall be governed by Section 22a-3a-6 of the Rules of Practice," which provide for a hearing.

Connecticut General Statutes Section 4-177 (a) states that in a contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice. The Department held hearings and transcripts were made for 22 separate hearing days.

- The department was following the Uniform Administrative Procedures Act when it issued a *proposed final decision* and a *final decision*.

Under the UAPA a *final decision* means the agency determination in a contested case or the decision made after reconsideration, but does not include a preliminary or intermediate ruling of an agency, or a ruling granting or denying a petition for reconsideration. A *proposed final decision* means a final decision proposed by an agency or a presiding (hearing) officer, which shall be in writing, and contain a statement of the reasons for the decision and a finding of fact and conclusion of law on each issue of fact or law necessary to the decision (C.G.S. Sec. 4-179).

Also, Section 22a-3a-6 (y)(1) of the Rules of Practice states that "after the hearing and the filing of any post-hearing legal submissions, the hearing officer shall, unless designated by the Commissioner to issue a final decision, issue a written proposed final decision.

- State statutes and the department's Rules of Practice were followed both when the proposed final decision was remanded and the final decision was ordered reconsidered. Remands and reconsiderations, while not typical, have occurred in other DEP proceedings.

Section 22a-3a-6(y)(3)(D) of the agency regulations states that "after the issuance of a proposed final decision, the filing of any exceptions and briefs, and presentation of any oral argument, the Commissioner ... may remand to the hearing officer for further proceedings, including the taking of further evidence." Statistics compiled by DEP show that of the 117 proposed permit decisions issued by the agency's adjudications office staff between July 1988 and April 1994, 8 were remanded to the office for further proceedings.

Section 22a-3a-6(z)(1) of the Regulations states that "...on motion made or his own initiative, the Commissioner may reconsider, reverse, modify, or correct a final decision..." in accordance with the Uniform Administrative Procedure Act (C.G.S. Section 4-181a). Under the UAPA, grounds for reconsideration of a final agency decision include errors in fact or law that should be corrected or the

discovery of new evidence "...which materially affects the merits of the case and which for good reason was not presented in the agency proceedings...." Section 4-181a(b) of the Connecticut General Statutes also permits an agency, on its own or upon request, to reverse or modify a final decision at any time upon "...a showing of changed conditions...." DEP adjudications office staff estimate that since 1989, when reconsideration of a final decision was explicitly authorized through statutory amendment of the UAPA, around five final decisions have been subject to reconsideration proceedings.

- The DEP commissioner was following the Rules of Practice when he appointed another person to be the final decision maker. The Department has exercised this option in other cases, although not frequently.

Commissioner is defined in Section 22a-3a-2 of the DEP Rules of Practice as the "...Commissioner of Environmental Protection or *his agent*...." Various other sections of the Rules of Practice indicate that someone other than the commissioner can make a final decision. DEP statistics on agency permit decisions show that since July 1988, 123 final decisions were issued; 13 of those were issued by DEP personnel other than the commissioner.

- DEP staff members responsible for preparing and presenting the agency's position on the Lisbon application were appropriately given "party" status according to the Rules of Practice.

Section 22a-3a-6 (a) of the Rules of Practice state that "...except as otherwise provided in the Rules, all rights, obligations and privileges of a party shall be deemed to include the Staff [of DEP]." This gives department staff the right to inspect and copy relevant and material records, papers and documents not in the possession of the party, the right to cross-examine other parties, intervenors, and witnesses and to present evidence and argument on the issues involved.

- The action to overturn the proposed final decision on remand (issued by Ms. Watts-Elder) in the final decision (issued by Dr. Thomas) is allowed under statute and the agency's Rules of Practice. Proposed decisions in other DEP cases have been reversed, although not frequently.

Section 22a-3a-6 (y) (3) (D) states that "in his *final decision* the Commissioner may affirm, modify, or reverse the *proposed final decision* . . . ." Statistics provided by DEP show that 117 *proposed decisions* were issued between July 1988 and April 1994; 8 of those were reversed in *final decisions*.

- The final amended decision (issued by Dr. Thomas on February 10, 1993) was appealed to Superior Court as allowed under the Uniform Administrative Procedures Act. In regard to issues of procedure, the court upheld the final decision maker; however, the decision

was remanded to DEP for further proceedings because the judge found one of the permit conditions violates the commerce clause of the federal constitution.

Under C.G.S. Section 4-183, any party aggrieved by a final decision can appeal to Superior Court. By statute, the court must affirm the agency decision unless it finds the administrative findings or conclusions are: 1) a violation of constitutional or statutory provisions; 2) beyond the agency's statutory authority; 3) based on unlawful procedure or affected by other errors of law; 4) clearly erroneous in view of the evidence on the whole record; or 5) arbitrary, capricious, or an abuse of discretion.

Parties opposing permitting of the Lisbon facility, including CRRRA and SCRRRA, filed appeals on the ground of procedural errors. For example, they claimed that certain updated capacity information should be allowed to be submitted into the record and considered by the final decision maker. In a decision issued February 16, 1994, the state trial judge for the case, Justice Shea, found the final decision maker made no errors in his rulings and acted within his discretion.

However, Justice Shea also concluded the permit condition requiring waste from one of the Lisbon customers, the Housatonic region, only be displaced by waste from other Connecticut towns was unconstitutional. In essence, the restriction violates the federal commerce clause by imposing an unjustifiable barrier to the importation of waste generated out-of-state. As the court was unable to determine whether the final decision maker would have found need for the Lisbon facility without imposition of this condition, the judge remanded the case to DEP for further proceedings specifically to resolve that issue.

- Further legal actions by several parties, including more appeals to court, are likely regarding the Lisbon case.

A motion by the applicant, Wheelabrator, to set aside the judgement to remand the case for further proceedings was denied on May 2, 1994. An appeal of the denial was pending before the Connecticut Supreme Court at the time the committee completed its review of the Lisbon matter.

Depending on the outcome the applicant's appeal, further administrative proceedings limited to the existing record may be held on the need for the Lisbon facility. If such proceedings resulted in a decision unfavorable to Wheelabrator, an appeal challenging the constitutionality of the determination-of-need law itself would be likely.

Opponents of the Lisbon facility recently petitioned DEP to initiate separate proceedings to reverse or modify the decision finding need on the basis of changed conditions. At present, the department is reviewing that request although

DEP had previously indicated it would await resolution of pending court appeals before undertaking any further administrative proceedings on the Lisbon matter. The petition is opposed by the applicant, who expects to complete construction of the Lisbon plant by mid 1995. If new proceedings are held on the basis of changed conditions and result in a reversal of the department's decision to permit the facility, legal claims for compensation of the applicant's multi-million dollar investment are likely.

### **CHAPTER III COMMUNICATION**

Guidelines for communication that occurs during a contested case before a state agency fall into two categories. One category pertains to communications with the decision makers for a case; the other involves all other contacts.

Communications with decision makers during a contested case, which would include DEP proceedings like the Lisbon permit process, are specifically addressed by a provision of the Uniform Administrative Procedure Act. Under C.G.S. Section 4-181, an agency hearing officer or final decision maker is prohibited from:

- communicating directly or indirectly regarding issues of fact with any person or party, without notice and opportunity for all parties to participate; or
- communicating directly or indirectly regarding issues of law with any party or any party's representative, without notice and opportunity for all parties to participate.

This restriction on ex parte communication applies from the date a contested case commences (generally the day the administrative hearing begins) until the effective date of the final decision.

Unlike the situation with decision makers, there is nothing in the UAPA that restricts communication between parties at any time during a contested case, or between parties and anyone else. What seems to be a potential complication with respect to communication rules is that during administrative proceedings like the determination-of-need process, DEP staff play two roles. As in other cases, certain department staff were decision makers regarding the Lisbon facility applications while other personnel worked on the Lisbon case in furtherance of DEP's status as a party representing the state's interests. Under the UAPA ex parte communication provisions, DEP staff acting in the capacity as a party to the proceedings, like any other party, are prohibited from communicating with the agency decision makers; however, the UAPA restriction does not prevent DEP staff acting as a party from communicating with other parties or persons.

#### ***Communication with Decision Makers***

In the Lisbon case specifically, unauthorized ex parte communication between the hearing officer (Ms. Watts-Elder), the final decision maker (Dr. Thomas), or staff assigned to assist them, *and* any person, party, or any party's lawyer, lobbyist, or other representative was prohibited during the department's administrative proceedings on the RESOL/Wheelabrator application. Program review committee research found no evidence of ex parte communication occurring between Ms. Watts Elder or Dr. Thomas and any of the parties or their representatives or any person, including the DEP commissioner, deputy commissioner, the governor or

members of his staff. (Several minor instances of contact, apparently related to scheduling matters, between decision makers and parties were noted in transcripts from the hearings on Lisbon and mentioned by several individuals during interviews with program review staff.)

Although many disputes arose between the parties during the Lisbon determination-of-need process, the record of the case shows no objections by any of the parties related to ex parte communication. None of the parties have cited the occurrence of ex parte communication during the proceedings in court appeals.

### *Communication with the Governor's Office*

Program review committee research revealed the governor's office had contact related to the Lisbon case with some parties and DEP officials, between the time Dr. Thomas issued his final decision on October 5, 1992, and his final amended decision on February 10, 1993. During this period, the governor's chief of staff (Mr. Stanley Twardy) had two meetings with individuals involved in the Lisbon case. The apparent purpose of the meetings was to try to resolve disagreements among the parties, particularly between DEP and CRRA, over the need for the Lisbon facility.

The first meeting held by Mr. Twardy was attended by the DEP commissioner (Mr. Keeney) and deputy commissioner for environmental quality (Mr. Moore) and representatives of CRRA including the authority president (Mr. Darcy) and chairman (Mr. Fay). The same individuals plus several representatives from Wheelabrator, including one of their lobbyists (Mr. Rome), were present at a second meeting called by Mr. Twardy. Neither the hearing officer nor final decision maker participated in either meeting. Both occurred after the final decision was issued, although the October 1992 decision was later reconsidered and amended.

In interviews with program review committee staff, participants in these meetings had different recollections of their timing. According to a May 18, 1994, letter sent by the governor's counsel (Mr. Mariani), to the program review committee co-chairs, both meetings occurred in October 1992. The president of CRRA, however, believes both meetings occurred in January 1993 while the commissioner and deputy commissioner of DEP recall the first meeting happening in October 1992 and the second taking place in January 1993. As there is agreement among all participants that both meetings took place after the first final decision but before the last final decision, the differences in specific dates are of no real significance.

## CHAPTER IV QUALIFICATIONS OF DEP STAFF

Among the Department of Environmental Protection staff with primary responsibility for carrying out the agency's determination-of-need process for Lisbon were: the hearing officer from the DEP adjudications office; the bureau chief designated final decision maker by the commissioner; and the technical staff from the waste bureau who prepared data and testified during administrative hearings on the Lisbon matter. The education and experience of the department decision makers as well as the technical staff are summarized in Table IV-1, on the following page.

Table IV-1 also shows the minimum qualifications for three types of positions responsible for analyzing data, methodologies, or technical materials and assessing need for facilities. They are:

- a Senior Siting Analyst for the Connecticut Siting Council;
- a Public Utilities Engineer 2 within the water area at the Department of Public Utility Control; and
- a Health Care Financial and Management Analyst 2 with the Commission on Hospitals and Health Care.

Each of the positions shown in the chart requires a minimum of seven years of relevant experience or an equivalent combination of college training and experience.

At the time of their involvement in the Lisbon case, all of the seven DEP staff listed in the chart had advanced degrees plus professional experience ranging from about 3 to 20 years. The technical qualifications of the DEP staff most directly involved in the Lisbon determination-of-need process are comparable to or exceed those of professionals doing similar types of analysis that are shown in Table IV-1.

Table IV-1. Qualifications of Staff Responsible for Facility Need Analysis		
POSITIONS WITH NEED ANALYSIS DUTIES	MINIMUM QUALIFICATIONS	
Siting Analyst (Environmental) CSC	<ul style="list-style-type: none"> <li>• 7 yrs. experience (e.g., environmental analysis, natural resource mgt., land use planning/regulation) OR</li> <li>• 2 yrs. + M.A. (bio., eng., earth/physical sci. nat. resource mgt.) OR</li> <li>• 3 yrs. + B.A. (same as above)</li> </ul>	
Engineer (Water) DPUC	<ul style="list-style-type: none"> <li>• 7 yrs. experience (engineering with 2 specialized in utility issues) OR</li> <li>• 3 yrs. + B.A. (engineering)</li> </ul>	
Fin. & Mgt. Analyst CHHC	<ul style="list-style-type: none"> <li>• 7 yrs. experience (fin. mgt.--prof. accounting or auditing--with some health care mgt.) OR</li> <li>• 2 yrs. + M.A. (accounting, finance, public health) OR</li> <li>• 3 yrs. + B.A. (same as above)</li> </ul>	
DEP STAFF WITH KEY ROLES IN LISBON CASE	EDUCATION	EXPERIENCE (as of 1994)
Hearing Officer (Proposed Decision)	J.D. (Law)	5.5 yrs. DEP • 5.5 Adjudications/Legal Services
Final Decision Maker	Ph.D., Geology	22 yrs. DEP • 5 mgt., Env. Services Bureau • 17 mgt., Nat. Resource Center 15 yrs. Other
Agency Tech. Staff (Prepared Prelim. Det. of Need)	M.A., Environmental Science	11 yrs DEP • 1.5 mgt., Air Bureau; • 9.5 mgt., Waste Bureau 16.5 yrs. Other
Agency Tech. Staff	M.A., Engineering (P.E.)	25 yrs. DEP • 5 mgt., Waste Bureau • 12 mgt., Water Bureau • 8 staff, Water Bureau
Agency Tech. Staff	M.P.A., Environmental Mgt.	9.5 yrs. DEP • 2 mgt., Waste Bureau • 7.5 staff, Waste Bureau
Agency Tech. Staff	M.S., Urban Planning	4 yrs. DEP • 4 staff, Waste Bureau 3.5 yrs. Other
Agency Tech. Staff	M.S., Zoology	6.5 yrs. DEP • 6.5 staff, Waste Bureau 6.5 yrs. Other
Source: LPR&IC Staff Analysis		



## CHAPTER V

### DATA AND METHODS USED TO DETERMINE NEED

The basic methodology employed to determine the capacity needed to dispose of Connecticut's municipal solid waste is outlined by the following formula:

$$\begin{array}{rcccccc}
 \text{NEEDED} & = & \text{AMOUNT OF} & - & \text{AMOUNT} & - & \text{CAPACITY OF} & - & \text{CAPACITY OF} \\
 \text{CAPACITY} & & \text{WASTE} & & \text{OF WASTE} & & \text{EXISTING} & & \text{OPERATING} \\
 & & \text{GENERATED} & & \text{RECYCLED} & & \text{RESOURCES} & & \text{LANDFILLS \& } \\
 & & & & & & \text{RECOVERY} & & \text{INCINERATORS} \\
 & & & & & & \text{FACILITIES} & & 
 \end{array}$$

The value of each term in the formula is calculated in the following manner:

The amount of waste generated is obtained by multiplying the state's population by the annual waste generation rate estimated for each person. The generation rate is estimated by dividing municipal solid waste weigh data (both disposed of and recycled) by the population of the towns providing the weighed waste.

The amount of waste recycled is obtained by multiplying the amount of waste generated by a recycling rate. The recycling rate is fixed at the goal set by state statute.

The capacity of existing resource recovery facilities is obtained by multiplying the maximum amount of waste each facility is designed to handle by the percentage of time it is expected to operate and then summing the results. For example, if a facility is designed to handle 500 tons of waste per day and to operate 310 days per year (85 percent) the daily capacity = (500 x .85) or 425 tons. Repeating this for each facility and adding the results together provides the aggregate available capacity.

The capacity of operating landfills and incinerators is obtained directly from existing DEP permits for those disposal facilities.

The methodology was developed as part of the current (1991) statewide solid waste managment plan. It was applied throughout the Lisbon proceedings by the department and other parties to determine the disposal capacity needed by the state. The assumptions used to calculate each of the components of the methodology, however, have differed among the parties and over time. Slight differences in the assumptions underlying each term in the equation are significant because the formula is sensitive to small changes, especially in waste generation and existing disposal capacity figures.

For example, if the per capita waste generation rate of .89 tons per year established by DEP in the state solid waste management plan is decreased to .85, and the state population stays relatively constant, the estimated total amount of waste generated declines by nearly 5 percent. Similarly, assuming the annual generation rate per person remains level at .89 tons, but reducing the projected number of people in Connecticut by five percent means a five percent decrease in total waste produced. In regard to plant capacity, increasing the expected availability of a 500 ton-per-day resource recovery facility from 80 percent to 90 percent, increases its disposal capacity by 50 tons per day. The corresponding reduction in the statewide need for disposal is also 50 tons per day.

Depending on what assumptions are applied to the basic methodology, the capacity need derived can change from positive (more capacity in the system is not needed) to negative (more capacity in the system is needed). As a result, much attention and debate related to the Lisbon case focused on the each component of the methodology, particularly waste generation and capacity, and the assumptions underlying their calculation.

### *Comparison of Needed Capacity Analysis*

Table V-1 compares the various ways need for resources recovery capacity has been calculated by the environmental protection department since the Lisbon matter began. The table includes: the need determination analysis from the February 1991 Statewide Solid Waste Management Plan, which was the basis for the agency's preliminary finding of need in the Lisbon case and the first proposed final decision (by hearing officer Watts-Elder); the hearing officer's proposed decision on remand; and the two final decisions (by designated final decision maker Dr. Thomas) related to the application for a resource recovery facility in Lisbon.

As the table shows, the differences among the capacity need derived in DEP's 1991 Solid Waste Management Plan and the two final decisions are primarily related to differences among the waste generation and facility operating rates used. In general, the Thomas decisions were based on lower generation rates and higher facility operating rates. The result is that both Thomas decisions yield a lower capacity need figure than DEP's 1991 plan. All three need calculations apply the statutory recycling rate in effect at the time--25 percent. The Thomas calculations use a higher figure than the plan for the amount of waste per day that can be put in landfills or incinerated, 624 tons compared to 400. This difference is attributable to the fact the plan forecasts need in the year 2010 when some or all of the current landfills and incinerators will no longer be in operation.

The exact data involved in the two proposed decisions were not specified. Precise comparisons with other the statements of capacity need, therefore, can not be made. The Watts-Elder proposed decision on remand also did not specify a particular time-frame or year on which need would be based.

**Table V-1. DEP Determination-of-Need Analysis: Comparison of Methods and Data**  
(Amounts shown are in Tons-Per-Day)

	<b>Capacity Needed (Year)</b>	<b>Waste Generated (Generation rate x population in millions)</b>	<b>Waste Recycled (Rate)</b>	<b>Capacity of Landfills &amp; Incinerators</b>	<b>Capacity Resources Recovery Facilities (Operating rate)</b>
<b>1991 DEP Plan</b>	1,291 (Year 2010)	8,534 (.89 x 3.49)	2,134 (25%)	400	4,709 (78%)
<b>Watts-Elder #2 *</b> <b>Proposed Decision on Remand 6/23/92</b>	No need (Year not specified)	Less than 8,534 (rate "substantially less than .89")	over 25 %	400	Exceeds 4,709 (over 78%)
<b>Thomas #1** Final Decision 10/5/92</b>	466 (Year 1998)	8,160 (.87 x 3.42)	2,040 (25%)	624	5,030 (85%)
<b>Thomas #2 ** Amended Final Decision 2/10/93</b>	378 (Year 1998)	8,046 (.86 x 3.43)	2,011 (25%)	624	5,033 (85%)
<b>DEP Plan Update Data: 2/1/94 (not including Lisbon facility)</b>	162 (Year 1998)	8,015 (.89 x 3.29)	2,412 (30%)	323	5,118 (85%)
	-9 (Year 2000)	8,119 (.89 x 3.30)	2687 (33%)	323	5,118 (85%)

**NOTES:**

\* Specific figures and calculations were not included in this written decision. The first Watts-Elder proposed decision (2/28/92), which found a need for the Lisbon facility, apparently accepted the 1991 Solid Waste Management Plan assumptions although neither figures nor calculations were cited.

\*\* The Thomas decisions, assuming the process to approve and construct a resources recovery facility may take up to five years, established 1998 as the focus of analysis to determine whether the proposed capacity would be needed in the short-term (versus at any time during the 20-year period covered by the state plan).

Source: LPR&IC Staff Analysis

Table V-1 also includes capacity need estimates for years 1998 and 2000 based on newer planning data DEP presented to the legislature's solid waste task force in February 1994. The information was developed as part of DEP's efforts to update and revise the 1991 statewide solid waste management plan. The two years shown are included because: 1998 is the year upon which the final decision on the Lisbon facility was based; and 2000 would likely be used as a base year during possible reconsideration proceedings (depending on the outcome of appeals to court).

The department's February 1994 need calculations showed that for the year 2000 the existing capacity is sufficient to handle the estimated amount of waste generated even if the Lisbon facility is not operating. The excess capacity is due largely to increasing the recycling rate from 25 to 33 percent of the waste generated, in recognition of a 1993 law raising the state source reduction and recycling goal to 40 percent by the year 2000. The updated figures also take into account an additional 90 tons per day of new capacity at one plant (Preston) authorized under legislation enacted in 1993.

The February 1994 analysis showed additional disposal capacity would be needed after the year 2000 (i.e., in the years 2008 and 2013) when capacity shortfalls would occur even with the Lisbon facility in operation. However, DEP anticipates estimates of future needed capacity will be reduced as its plan update process continues because downward revisions of state population estimates and upward revisions of facility operating rates are likely.

The 1991 census data originally used by the department in its need determination calculations assumed small but steady population growth over the 20-year planning period. Recently revised population estimates from the census bureau and other sources now indicate: 1) Connecticut's population actually declined in recent years; 2) slight decline or no growth will continue through the year 2000; and 3) very small increases will occur each year afterward through 2015. Current DEP projections show the state population in the year 2000 will be 3.27 million, or 60,000 less than estimated in February 1994. Just the lower population figure, assuming the waste generation rate stays at .89 tons per person, means 150 fewer tons of waste would be generated each day in that year.

Available capacity of resources recovery facilities, assumed to be 85 percent of design capacity in the Lisbon final decision and the February 1994 draft of the solid waste plan, is expected to increase to more than 90 percent in the updated solid waste management plan. At the department's request, each facility operator recently submitted proposed rates based on their actual operating experience. Using these figures, which ranged from 85 to 100 percent of maximum design capacity, overall available system capacity would be 93 percent of total design capacity or 5,576 tons per day. This is 458 tons per day more than at the 85 percent level assumed previously.

As the analysis summarized in Table V-2 shows, lower population growth combined with greater than expected availability of existing resources recovery plants capacity results in excess

capacity through the year 2010 without the Lisbon facility. Excess capacity would peak in the year 2000 at more than 700 tons per day assuming:

- 1) available capacity can be maintained at more than 90 percent;
- 2) the goal of 40 percent recycling/reduction is achieved by the year 2000; and
- 3) waste generation per capita remains level at .89.

However, further refinements and revisions of capacity need analysis will occur as the department completes its draft solid waste management plan.

Table V-2. Analysis of Capacity Needed Using Updated Population Estimates and Proposed Facility Operating Rates*					
YEAR	CAPACITY NEEDED	WASTE GENERATED AT RATE = .89 (Population)	WASTE RECYCLED (Rate)	LANDFILL & INCINERATOR CAPACITY	RESOURCES RECOVERY CAPACITY** (Rate)
1998	-410	7,969 (3.27 million)	2,480 (28%)	323	5,576 (93%)
2000	-719	7,996 (3.27 million)	2,789 (31%)	323	5,576 (93%)
2010	-198	8,274 (3.39 million)	2,896 (31%)	0	5,576 (93%)
Notes: * Amounts shown in tons per day ** Not including Lisbon Facility (425 tons per day; 85 percent)					
Source of Data: DEP, July 1994					

For example, DEP staff is considering including data not previously available on recycled commercial waste to its waste generation figures. At present, it is believed this addition would increase the state's per capita rate from .89 to .93 tons per year. Applying the higher generation rate to the need determination formula would increase the proportion of state waste that is recycled and reduce but not eliminate the amount of excess resources recovery capacity projected by the analysis shown in Table V-2. Excess capacity would peak at nearly 500 tons per day in the year 2000 using a .93 generation rate and drop to 44 tons per day by the year 2010, again without including the capacity of the Lisbon facility.

Additional changes in need calculations are also possible in response to input received from citizens and interested parties during public hearings that will be held on the draft plan. Wheelabrator, the developer of the Lisbon facility, for instance, believes current DEP planning efforts do not adequately incorporate the impact of an improving state economy. In contrast to the 0.8 percent annual growth currently estimated by the department, a recent academic study commissioned by the Lisbon developer forecasts the volume of waste generated in Connecticut will increase between about 3 to 4 percent per year through 1998, correlating with a predicted rise in per capita income as well as other significant state economic variables.<sup>1</sup>

The link between economic activity and waste generation is generally recognized by the solid waste management industry as well as planners and experts in the field. Research to better understand the relationship among various economic indicators and the generation of municipal solid waste is being carried out by many public and private organizations. Several recent studies, for example, are aimed at developing econometric models that can more accurately forecast waste generation, disposal, source reduction, and recycling trends. Earlier this year, the California Integrated Waste Management Board adopted a draft formula, developed by a team of university researchers, for measuring progress in reducing solid waste that incorporates employment and tax data as well as population figures to estimate future waste amounts. Franklin Associates, the consulting firm that prepares waste characterizations for the U.S. Environmental Protection Agency, recently completed an analysis of growth in waste generation, population and gross domestic product (GDP) that found waste generation tracks GDP more closely than population.

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<sup>1</sup> See Adams, Richard G. and Rebecca E. Adams, *A Moving Target--Waste Generation and the Economy: Incorporating Economic Recovery Forecasts into Disposal Capacity Planning Projections*, originally prepared for the Solid Waste Association of North America, July 1, 1994, revised September 9, 1994.

## **APPENDICES**

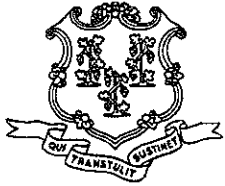




## **APPENDIX A**

### **AGENCY RESPONSE**





STATE OF CONNECTICUT  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



Mr. Michael L. Nauer, Director  
Legislative Program Review  
and Investigations Committee  
State Capitol  
Room 506  
Hartford, CT 06106-1591

Dear Mr. Nauer:

Thank you for providing the Department with a copy of your Committee's December 1994 final staff report entitled "DEP Resources Recovery Facility Determination-of-Need Process." Your staff and the committee have obviously conducted a very thorough review of the determination of need process undertaken by the Department in conjunction with the application for solid waste construction permits for the Lisbon Resource Recovery Facility.

The Department concurs with your findings that Department staff complied with all relevant statutes and regulations, did not participate in any prohibited ex parte communication, and conducted their analyses soundly and competently. As you know, this case has been a particularly difficult one. I continue to be proud of the staff's professionalism and commitment to carrying out their responsibilities carefully and fairly.

Thank you for the opportunity to review the report.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Robert E. Moore".

Robert E. Moore  
Chief Operating Officer

cc: Richard J. Barlow, DEP



## APPENDIX B

### Formal Interviews Conducted by Program Review Staff: Department of Environmental Protection Determination-of-Need Process Study

Richard Adams, *Attorney for Party--Applicant (RESOL)*

Charles Atkins, *DEP Staff (Waste Management)*

Richard Barlow, *DEP Staff (Waste Management)*

Judy Belaval, *DEP Staff, (Planning)*

John Boland, *Attorney for Party--Concerned Citizens of Lisbon (CCOL)*

William Darcy, *Connecticut Resources Recovery Authority (CRRRA) President*

Carmine DiBattista, *DEP Staff (Planning, Preliminary Determination of Need)*

Charles Duffy, *Lobbyist for Applicant (Wheelabrator)*

Lois Hager, *DEP Staff (Planning)*

Timothy Keeney, *DEP Commissioner*

Roger Koontz, *Attorney for Party--Southeastern Connecticut Regional Resources  
Recovery Authority (SCRRA)*

Alan Kosloff, *Attorney for Party--City of Norwich*

Robert Moore, *DEP Deputy Commissioner*

Lewis Rome, *Lobbyist for Applicant (Wheelabrator)*

Michael Sullivan, *DEP Staff (Legal Advisor to Final Decision Maker)*

Calin Tanovici, *DEP Staff (Waste Management)*

Hugo Thomas, *DEP Staff (Final Decision Maker)*

Stanley Twardy, *(former) Chief of Staff, Governor Weicker*

Cynthia Watts-Elder, *DEP Staff (Hearing Officer)*

Robert Wright, *Attorney for Party--CRRRA*



## APPENDIX C

### STATUTE SUMMARY/LEGISLATIVE HISTORY:

#### DEPARTMENT OF ENVIRONMENTAL PROTECTION DETERMINATION-OF-NEED PROCESS

Resources recovery facilities became subject to a certificate-of-need process in 1987 with passage of Public Act 87-556. The act required the commissioner of the Department of Environmental Protection (DEP), before issuing a permit for a resources recovery facility, to make a written determination that: a) the facility is needed to meet statewide solid waste disposal needs; b) will not result in substantial excess resources recovery capacity; and c) will not disrupt the orderly transportation or disposal of solid waste in the area affected by the facility. The requirement, which was not intended to impact pending permit applications or facilities that had obtained permits, went into effect upon passage of the act (July 6, 1987).

Sponsors of the determination-of-need legislation noted it was aimed at preventing overbuilding of waste-to-energy plants. Fears that excess resources recovery capacity would be a disincentive to recycling and could promote importation of garbage from other states were expressed in environment committee public hearing testimony and floor debate during the 1987 regular session. Another concern was that overbuilding could cause some plants to fail due to a lack of waste deliveries and the state, as the ultimate financial backer of the CRRA facilities, could be at risk.

Provisions of the 1987 law concerning the orderly transportation of solid waste were an attempt to address concerns about a concentration of plants in certain areas of the state and the possibility of one region "raiding" another's wasteshed. Overall, the legislature's intent was to establish a process by which the DEP commissioner, in granting a permit, would have to review the solid waste disposal needs of the entire state and consider the specific regional impact of a proposed resources recovery facility.

Legislation enacted in 1989 (P.A. 89-386), established the specific statutory criteria and procedures for determining need present in current law. Amendment of the earlier law to clarify and elaborate on the process had been suggested by DEP. The 1989 revision detailed the capacity and need information an applicant is required to supply and the factors the DEP commissioner must consider in assessing need. In addition, decisionmaking on need determination was specifically linked to the state solid waste planning document. Public Act 89-386 also eliminated references the orderly transportation or disposal of waste and extended the certificate of need process to other types of solid waste disposal facilities (i.e., landfills for both resources recovery facility ash residue and mixed municipal solid waste). In 1991, the process was again extended--to composting facilities--by P.A. 91-293.

During the 1993 session, legislation was introduced to modify the determination-of-need process and institute a moratorium on permits for new resources recovery facilities. In testimony to environment committee, DEP stated its opposition to a statutory moratorium even

for a short duration since it would circumvent the agency's long-range planning process for solid waste management. Moratorium supporters believed a statutory ban was necessary to prevent additional, unnecessary plants from being built. One bill, which eventually passed in the House but not in the Senate (Substitute S.B. 231), would have effectively stopped construction of the Lisbon plant as well as prevented future resources recovery facilities. An amendment to exempt certain facility modifications from the determination-of-need process, discussed in more detail below, was the only statutory revision enacted during 1993. Moratorium legislation was reintroduced but again failed to pass both chambers in the 1994 session of the General Assembly.

**Current law.** Permit applications to construct or expand a resources recovery facility either pending on or received after July 1, 1989 are subject to the requirements outlined in C.G.S. Section 22a-208d as amended by P.A. 93-372. A permit to construct or expand a resources recovery facility cannot be issued unless the DEP commissioner determines in writing that the facility:

- is "... necessary to meet the solid waste disposal needs of the state..." *and*
- will not result in "...substantial excess capacity...." (C.G.S. Sec. 22a-208d(a)).

The commissioner, within 60 days of determining a permit application to construct a facility is complete, is required to publish notice of a preliminary determination of need. This is defined as a statement by the commissioner that there is need for a resources recovery facility while the permit application is pending.

Anyone may submit written comments on the preliminary need determination in the same manner as comments are to be submitted regarding the permit application. A final determination of need cannot be made unless a permit is issued. If a permit is not issued, a preliminary determination is void.

The permit applicant must submit information the commissioner deems necessary, including but not limited to:

- 1) design capacity of the proposed facility;
- 2) planned operating rate and throughput<sup>1</sup>;
- 3) an explanation of any difference between the first two items;

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<sup>1</sup> Throughput is statutorily defined as the amount of municipal solid waste processed by a resources recovery facility determined by dividing average annual tonnage by 365 days (C.G.S. Sec. 22a-207(22)).



- 4) estimates, and the methodologies used to determine them, of the following factors--
  - a) tons per day of waste generated by and to be received from each customer of the facility as evidenced by contracts or letters of intent,
  - b) waste to be recycled, and
  - c) changes in amounts of waste generated over the design life of the facility due to population growth, waste generation, source reduction, and industrial and commercial development;
- 5) a contingency plan for use of capacity if actual throughput declines or increases at least 10 percent from estimated throughput;
- 6) an analysis of reasonable reserve capacity for seasonal peaks and unexpected facility outages;
- 7) applicant's capability to complete the project;
- 8) technical feasibility; and
- 9) a demonstration that the throughput of the proposed facility in combination with that of any other applicants for new construction permits, existing facilities with expansion permits, and composting facilities, will not exceed the total resources recovery and composting facility throughput established as needed to process waste generated in the state in the statewide solid waste management plan.

In addition to the data supplied by the applicant, the commissioner must consider the current and anticipated availability of throughput capacity at resources recovery facilities, composting facilities, land disposal areas, recycling facilities and other processing and disposal facilities that have obtained construction permits, and any other pertinent information in making a determination of need. The commissioner is further required to insure that no waste is accounted for more than once, as a result of transfer or any other reason.

Legislation enacted during the 1993 legislative session (P.A. 93-372) exempts certain modifications to existing resources recovery facilities from the DEP certificate-of-need process. Specifically, applications for permits or permit modifications from facilities operating on June 30, 1993 (the effective date of the act) that do not involve expanding boilers or waste handling and processing equipment can be issued by the commissioner without a determination of need. A facility that has received any permit or determination of need but not an operating permit prior to June 30, 1993 is not affected by the exemption. Similarly, the act has no impact on related actions of the commissioner, proceedings, or judicial review, pending on or begun after that date.



## **APPENDIX D**

### **CHRONOLOGY**

#### **DEP PERMITTING PROCESS FOR LISBON RESOURCES RECOVERY FACILITY**

##### **1987**

- 1987      Public Act 87-556 establishes written determination-of-need process for resources recovery facilities (RRFs) that applies to applications for permits submitted on or after July 6, 1987 (act's effective date).

##### **1988**

- 1988      Riley Energy Systems of Lisbon (RESOL) receives local approval/permits from the town of Lisbon for a waste-to-energy plant to be located in that municipality (inland wetlands permit 8/88; P&Z special permit 12/88).
- Bristol facility begins operating (5/88). Two CRRA projects open--Bridgeport (7/88) and Mid-CT in Hartford (10/88). Windham plant, which opened in 1981, also in operation.
- 12/8/88    RESOL submits initial permit applications to DEP (i.e., permit to construct a solid waste facility and air- and water-related permits).

##### **1989**

- 1989      Public Act 89-306 changes written determination of need requirement for new resources recovery facilities; specifies criteria and outlines procedures that apply to pending and new applications to construct or expand facilities effective July 1, 1989.
- CRRA project in Wallingford begins operating (5/89).
- 3/15/89    RESOL submits application for certificate of environmental compatibility and public need to Connecticut Siting Council (CSC).
- 7/12/89    RESOL submits information to DEP in support of a preliminary determination of need (as established by P.A. 89-306) .
- 11/17/89    DEP commissioner (Carothers) informs RESOL need is not adequately demonstrated by materials submitted

##### **1990**

- 2/5/90      Siting Council issues decision granting RESOL a certificate of public necessity and environmental compatibility.

Aug. 90 RESOL sells interests to Wheelabrator Environmental Systems, Inc. (WESI), a subsidiary of Waste Management.

10/2/90 RESOL and parent company Wheelabrator submit revised application for need determination.

Nov. 90 RESOL submits revisions of its application to DEP (on 11/6 and 11/14).

11/26/90 DEP staff recommend "affirmative declaration for preliminary determination of need" be issued.

#### 1991

1/1/91 Mandatory recycling becomes effective (voluntary recycling began in many communities during 89-90 period).

Feb. 91 Updated DEP State Solid Waste Management Plan issued; identifies need for additional RRF capacity over the 20-year planning period and sets ceiling of 6,000 tons per day on total RRF capacity in the state.

Apr. 91 DEP adjudications unit assigns hearing officer, sets consolidated public hearing date(s) for all Lisbon permits and need determination.

5/19/91 DEP publishes notice RESOL application complete.

6/3/91 Pre-hearing conference held with applicant, DEP staff, and other parties, which included at the time CRRA, Concerned Citizens of Lisbon (CCOL), City of Norwich, Norwich Sewer Authority, and the North Eastern Connecticut Regional Resources Recovery Authority (NECRRA).

June -  
Oct. 91 DEP hearings held on RESOL application before hearing officer (Watts-Elder)  
- Public comment session (in Lisbon): June 19, 1991  
- Adjudicatory sessions: July 9, 10, 11, 12, 16, 17, 18, 24, 25, 1991; Aug. 7, 15, 22, 1991 and Oct. 21, 1991.

#### 1992

Feb. 92 CRRA/Southeastern Connecticut Regional Resources Recovery Authority (SCRRA) project in Preston (Southeast) begins operating.

2/27/92 DEP commissioner (Keeney) officially delegates authority to act as final decisionmaker to Dr. Hugo Thomas, Environmental Services Bureau Chief.

2/28/92 Proposed final decision issued by hearing officer (Watts-Elder). *Recommends a final determination of need be issued provided signed contracts that contain certain provisions about recycling are submitted. However, also recommends construction permit not be issued at this time due to concerns over insufficient evidence of consistency with state water quality standards.* Oral arguments scheduled since appeal is expected.

3/13/92 SCRRRA petitions as an intervening party; request granted by final decision maker (Thomas).

3/20/92 Oral argument before final decision maker (Thomas); matter remanded to hearing officer (Watts-Elder) for taking of additional evidence re four issues including need, i.e.,

- ozone health impact;
- attainment of national ozone standards;
- water discharge effects; and
- need determination.

In remand order, final decisionmaker (Thomas) also requests applicant submit signed contracts from municipal customers to the hearing officer.

Mar. &  
Apr. 92 Hearings on remand before hearing officer (Watts-Elder) held on 3/27, 3/30, 4/2, 4/7, 4/21, 4/30. Applicant submits executed contracts as requested.

6/23/92 Proposed decision on remand issued by hearing officer (Watts-Elder). *Modifying earlier proposed decision due to new issues raised during remand hearing, hearing officer recommends final determination of need not be issued.* Oral argument scheduled; briefs requested.

7/1/92 Oral argument briefs on proposed decision on remand submitted.

7/9/92 Oral argument before final decisionmaker (Thomas).

10/5/92 Final decision issued (by Thomas). *Not adopting the hearing officer's recommendation, final decisionmaker authorizes issuance of final determination of need simultaneously with issuance of a solid waste permit.*

10/16/92 CRRA submits petition for reconsideration.

10/20/92 SCRRRA submits petition for reconsideration.

11/13/92 Decision to reconsider issued by final decisionmaker (Thomas).

12/10 &  
12/15/92 Reconsideration oral arguments before final decisionmaker (Thomas).

### 1993

2/10/93 Amended final decision issued (by Thomas). *Based on new data, "the most recent and accurate numbers available," final decisionmaker concludes need for resources recovery capacity still exists and facility will not create substantial excess capacity; final decisionmaker authorizes issuance of final determination of need simultaneously with solid waste permit to construct.*

3/20/93 CRRA files appeal of amended final decision in Superior Court.

6/23/93 RESOL submits notice of intent to commence construction of Lisbon plant to Siting Council.

7/14/93 Siting Council approves resolution to consider amending certificate granted Lisbon in response to changes in waste sources as reported in RESOL notice of intent to commence construction.

July 93 Windham waste-to-energy plant closes.

10/4/93 Siting Council amends 1990 decision but finds no evidence that changes in waste sources for Lisbon plant inconsistent with state policy or require change in construction or operation approved earlier.

Oct. 93 CRRA appeals siting council decision to court.

RESOL begins construction of Lisbon plant.

Dec. 93 Oral argument on CRRA appeal of DEP decision (before State Trial Judge Shea)

### 1994

2/16/94 Court decision on CRRA appeal of DEP amended final decision issued (Shea). *Appeal sustained and case remanded to DEP for further proceedings because the judge believes permit contains a condition that violates the commerce clause of the federal constitution.* DEP on advice of AG office decides not to appeal.

3/4/94 RESOL files motion for reconsideration of court decision.

3/23/94 Oral arguments on reconsideration motion (before Shea).

- 5/2/94 After reconsideration, court (Shea) denies RESOL motion to set aside 2/16/94 judgment remanding the case for further DEP proceedings; RESOL appeal of denial pending.
- 7/15/94 CRRA files request with DEP that the commissioner reconsider and modify the 2/10/93 determination that the Lisbon facility is needed on the grounds that since the time of that decision, conditions have changed dramatically and undercut any alleged need for a new facility.





## APPENDIX E

### DEPARTMENT OF ENVIRONMENTAL PROTECTION DETERMINATION-OF-NEED PROCESS: MAJOR STEPS

Major steps involved in the environmental protection department's determination-of-need process for resources recovery facility capacity are outlined below. Explanatory comments are noted in italics below some steps. The process is a combination of requirements established under the following statutes and regulations: the determination-of-need law itself (C.G.S. Section 22a-208d); the Uniform Administrative Procedure Act (C.G.S. Chapter 54); and the environmental protection department's Rules of Practice for its proceedings, which were adopted as agency regulations (Sections 22a-3a-2 through 22a-3a-6), and became effective June 19, 1992.

1. Applicant submits application for a permit to construct or expand a facility requiring a written determination of need
2. DEP reviews application for completeness both in terms of need criteria and relevant environmental permit requirements

*(No statutory time limit is set for this review)*

3. DEP determines application is complete
4. A preliminary determination of need must be made by the DEP commissioner and notice of it published within 60 days of finding the application is complete  
*(Apparently the preliminary determination apparently can be either affirmative or negative although it is defined as the commissioner's statement of the need for a proposed facility while its construction permit application is pending)*
5. Any person may submit written comments on the preliminary determination and DEP may but is not statutorily required to hold a public hearing
6. A public hearing on the application may be requested by any party to a DEP permit proceeding or the agency may schedule one of its own initiative.

*(DEP hearings on contested permit applications are adjudicatory proceedings subject to the agency's Rules of Practice regulations as well as the UAPA. Unlike public hearings aimed at gathering comments from interested citizens and others, they are more like court proceedings; subpoenas may be issued for persons to appear or produce documents, evidence is presented, witnesses testify under oath and may be cross-examined.)*

7. Hearing officer from DEP Office of Adjudications appointed by director of that office to conduct administrative hearings on application

*(The role of the hearing officer is to be an independent fact finder, hear evidence and recommend a proposed final decision. Most of the hearing officers that staff the department's adjudications office are attorneys.)*

8. The commissioner of the agency usually acts as the final decisionmaker, but may at any time during the process, designate another person to serve as the final decisionmaker.

9. Prehearing conferences, if desired, is held.

*(Prehearing conferences, which are in fact encouraged, are intended to mark evidence, dispose of disputes about discovery and work out other details prior to a hearing.)*

10. Hearing is scheduled; notification must be sent to all parties from the Adjudications Office in DEP.

11. Parties submit relevant documents to hearing officer prior to the hearing date.

*(The applicant must file all documents that will be presented at the hearing including lists of witnesses and resumes of expert witnesses with the hearing officer at least 15 days before the hearing; other parties must file similar documentation at least 10 days before the hearing.)*

12. Hearings are held.

*(In a proceeding involving an application like the Lisbon case the burden of proof is on the applicant to show why the application should be granted.)*

13. A record must be maintained on the proceedings.

*(The record is required to contain two parts: 1) briefs, correspondence; and 2) evidence, including all the exhibits, and recording of the hearings, but is not required to include a written transcript.)*

14. Once the hearings are completed, no new evidence may be introduced unless the hearing officer rules that it is material and finds there was good cause for not introducing it during the hearing. Other parties are allowed the opportunity to respond and cross-examine the person offering the evidence.

15. After the hearings are completed, the hearing officer may allow, or may require that parties submit post-hearing briefs and findings of fact and conclusions of law.

16. The hearing officer issues a written proposed final decision. The proposed final decision

must include a statement of the reasons for the decision and a finding of facts and conclusion of law on each issue of fact or law necessary to the decision.

17. Decision is then served upon all the parties. There is no required time period for this decision to be issued.

18. After delivery of the proposed final decision, the parties have 15 days to file exceptions to the decision, and may request to present oral arguments to the commissioner or person serving as final decisionmaker.

19. The final decisionmaker, upon the request of parties or own initiative, may schedule oral arguments. Notice is required to all parties regarding date, and any date requirements for briefs to be filed.

20. The final decision is issued after the proposed final decision has been issued, and oral arguments, if any, are held.

*(The final decision must be issued within 90 days after the close of oral arguments or issuance of briefs. The final decision is delivered to each party by certified mail. The final decision may affirm, modify, or reject the proposed final decision.)*

21. The final decisionmaker may also remand the case back to the hearing officer for further proceedings, including the taking of further evidence.

*(The hearing officer must follow the same proceedings outlined in the UAPA and the DEP's Rules of Practice for hearings in the remanded case, and must issue another proposed final decision.)*

22. Once the proposed decision (on the remanded case) has been issued by the hearing officer, and has been delivered to the parties, the parties may again file exceptions and/or request oral arguments.

23. The commissioner or final decisionmaker may again request briefs on the proposed decision. Once the briefs been files, or oral arguments presented, the final decision must be issued within 90 days.

24. Within 15 days after delivery or mailing of the final decision, parties have 15 days to file a petition with the final decisionmaker to reconsider the decision. The final decision

maker has 25 days after the filing of the petition to act on the reconsideration request.

25. The final decisionmaker may decide on own initiative within 40 days after mailing the final decision to reconsider the case.

*(The final decisionmaker must follow the UAPA and the DEP Rules of Practice in any proceedings in the reconsideration of a case.)*

26. After reconsideration, a final decision is again issued.

27. Parties have 45 days after a final decision has been mailed to appeal the agency decision to Superior Court

28. On a showing of changed conditions, the agency may reverse or modify the final decision, at any time, at the request of any person or on its own motion.

*(All parties to the original proceeding must be notified and given the opportunity to participate, all applicable procedures under the UAPA and the Rules of practice apply, and any decision to reverse or modify a final decision must make provision for the rights or privileges of anyone who has relied on that final decision.)*